

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

USC UNIVERSITY HOSPITAL

and

**Cases 21-CA-39656
21-CA-39693
21-CA-39798
21-CA-39799
21-CA-39808
21-CA-39870**

**NATIONAL UNION OF HEALTHCARE
WORKERS**

**ANSWERING BRIEF OF
COUNSEL FOR THE ACTING GENERAL COUNSEL
TO RESPONDENT'S EXCEPTIONS**

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I. STATEMENT OF THE CASE

In a decision that issued on April 11, 2012, Administrative Law Judge Gregory Z. Meyerson ("ALJ") held that Respondent, USC University Hospital, violated Section 8(a)(1) and (5) of the National Labor Relations Act by making the following unilateral changes in employees' terms and conditions of employment:

- By eliminating the Extra-Shift Bonuses paid to pulmonary diagnostic services department employees when they are called back to work from the On Call Schedule and
- By eliminating the mandatory OR Blood Gas Lab On-Call Schedule for the pulmonary diagnostic services department employees.¹

Although the ALJ made other findings and conclusions, sustaining some allegations of the Region's complaint and dismissing others, Respondent filed exceptions only to the foregoing findings and conclusions pertaining to the pulmonary diagnostic services department employees.

The ALJ also held that Respondent did not violate Section 8(a)(1) and (5) of the Act by eliminating a 7-minute "grace period" in the Laboratory, Respiratory, and EVS departments and by disciplining Juan Michael Torres, Traci Mills and Melissa Lynch for arriving at work 7 minutes or less after the start of their shifts. The ALJ further held that Respondent did not violate Section 8(a)(1) and (3) of the Act by disciplining Juan Michael Torres. On May 9, 2012, the National Union of Healthcare Workers, the Charging Party Union, filed exceptions to these findings and conclusions. This Brief answers only Respondent's exceptions.

¹ "ALJD" refers to the Administrative Law Judge's Decision. Citations will refer to the page number followed by the line numbers. The transcript will be referred to as "Tr." followed by the appropriate page number. General Counsel's exhibits will be referred to as "G.C. X" followed by the appropriate exhibit number and Respondent's exhibits will be referred to as "R. X" followed by the appropriate exhibit number.

II. ISSUES PRESENTED

- Did the ALJ correctly conclude that Respondent violated Section 8(a)(1) and (5) of the Act by: unilaterally eliminating the extra shift bonus for the pulmonary diagnostic services department employees?
- Did the ALJ correctly conclude that Respondent violated Section 8(a)(1) and (5) of the Act by: unilaterally eliminating the on-call schedule for the pulmonary diagnostic services department employees?

III. STATEMENT OF THE FACTS

A. *Background*

Respondent is an acute care hospital with a facility located at 1500 San Pablo Street in Los Angeles, California. Since June 17, 2010, the date that the Union was certified by the Board, Respondent has had a collective-bargaining relationship with the NUHW, who represents a unit of service, maintenance and technical employees (herein the Unit) employed at the Hospital.² Prior to April 1, 2009, the Hospital was owned by Tenet. In June 2004, during the time that Tenet operated the Hospital, the Board certified the SEIU to represent the Unit. Thereafter in approximately 2007, the SEIU and Tenet, on behalf of several Tenet-owned hospitals, including the facility at USC, executed a collective-bargaining agreement effective by its terms from January 1, 2007, to March 31, 2011. (ALJD 2-3).

² This unit includes all full-time, regular part-time and per diem service, maintenance, technical and skilled maintenance employees employed by Respondent at its facility located at 1500 San Pablo Street, Los Angeles, California, and excludes all other employees, managers, supervisors, confidential employees, guards, physicians, residents, central business office employees (whether facility-based or not) who are solely engaged in qualifying or collection activities, employees of outside registries and other agencies supplying labor to the Employer and already-represented employees. (ALJD 2:n.3).

In approximately January of 2009, in anticipation of the sale of the Hospital, Tenet and the SEIU executed a modified version of the above-described collective-bargaining agreement which included only those provisions of the agreement that related to the Hospital and deleted all references to Tenet. This modified agreement was not negotiated between the parties but, for convenience sake, was merely cut and pasted from the old contract. This modified version of the collective-bargaining agreement expired on March 31, 2011. (ALJD 2;44-45; Tr. 44-46). This modified agreement (herein Agreement or CBA) contains the terms and conditions of employment currently in effect between Respondent and the Union.

In April 2009, Respondent purchased the Hospital from Tenet. At that time Respondent agreed to recognize the SEIU as the collective-bargaining representative of the Unit as well as adopt the terms of the Agreement between Tenet and SEIU insofar as such terms were not unique to Tenet. A week or so prior to an election scheduled in May 2010, the SEIU, the incumbent union, disclaimed interest in the Unit and following an election in June 2010, the NUHW was certified as the new collective-bargaining representative of employees in the Unit. (ALJD 2:45; Tr. 727-728). Respondent and the NUHW began bargaining for a new collective-bargaining agreement in August of 2010 and, to date, nearly 17 months later, the parties have not yet reached agreement on a new collective-bargaining agreement. (ALJD 3:4-5; Tr. 44-46; 274-275).

B. The Pulmonary Diagnostic Services Department is Separate From the Respiratory Therapy Department.

The respiratory therapists, pulmonary function technicians, and the OR (operating room) blood gas technician employed at the Hospital are all part of the Unit. (ALJD 3:12; Tr. 50-51; 330-331; 444-445). The Respiratory Therapy Department and Pulmonary Diagnostic Services

Department are overseen by Director of Respiratory Therapy and Pulmonary Diagnostic Services, George Sarkissian (herein Sarkissian). (ALJD 4: 32; Tr. 330; 332; 498-499). Although Sarkissian oversees both of these departments, each department is directly supervised by a separate manager. The Respiratory Therapy Department is directly managed by Department Manager of Respiratory Services Tracy O'Connel (herein O'Connel) and the Pulmonary Diagnostic Services Department is directly managed by Susan Farr (herein Farr),³ (ALJD 4:32-38; Tr. 334; 526).

There are four pulmonary function therapists⁴ employed at the Hospital and one OR blood gas technician. Basil Nasir (herein Nasir)⁵ is the only OR blood gas technician employed at the Hospital. The pulmonary function therapists and the OR blood gas technician are all part of the Pulmonary Diagnostic Services Department. (ALJD 4: 44; Tr. 329-330; 334; 441-443).

Although employees in the Pulmonary Diagnostic Services Department are licensed respiratory therapists, like the respiratory therapists in the Respiratory Therapy Department, the work they perform and the hours that they work are separate from the work performed by and the schedules of the respiratory therapists in the Respiratory Therapy Department. While the Respiratory Therapy Department operates 24 hours a day, 365 days a year, the Pulmonary Diagnostic Services Department is open only Monday through Friday from approximately 7:00 a.m. to 7:30 p.m. (ALJD 4:44; Tr. 330-331). The respiratory therapists care for patients throughout the hospital, providing respiratory therapy services for patients as needed. (Tr. 57). The Pulmonary Diagnostic Services employees, however, are a specially-trained group of respiratory therapists that, unlike the other respiratory therapists, are stationed in the pulmonary

³ Respondent did not produce Farr to testify at the hearing. (Tr. 890-895).

⁴ These therapists include: Darren May; Roxanna Medrano; Ruben Duran, and Chris Bogg (who recently replaced therapist Lisa Rogers). (Tr. 285; 330-331).

⁵ Nasir is a shop steward for the Union. He has held this position since 2009.

lab and the operating room and perform specialized diagnostic tests. (ALJD 4:44-50; Tr. 328-330). The Respiratory Therapy Department is also much larger than the Pulmonary Diagnostic Services Department, in that it employs approximately 93 respiratory therapists. (ALJD 5:4-5; Tr. 526).

The pulmonary function technicians in the Pulmonary Diagnostic Services Department perform a variety of tests to help evaluate a patient's lung function, tests that doctors then use to diagnose diseases. They also administer other types of tests to monitor long-term patients or cystic fibrosis patients, including conducting arterial blood gas tests, pulmonary function tests and exercise studies. (ALJD 5:7-8; Tr. 328). The pulmonary function lab is located on the second floor of the Hospital. For every surgery that is performed at the Hospital, certain blood work and blood tests need to be performed. Accordingly, the OR blood gas technician obtains blood tests and runs blood samples for patients receiving procedures in the operating room and reports those results to the anesthesiologists as the surgery is ongoing. The OR blood gas technician also monitors and maintains the blood gas machines used to determine if there is a need for respiratory therapy and interprets those results for the doctors. The OR blood gas lab is located in the operating rooms on the fourth floor of the Hospital. (Tr. 332-333; 442-443).

OR blood gas technician Nasir is the only employee at the Hospital *permanently* assigned to work in the operating room and perform the blood gas studies on a regular basis. Nasir performs these duties on Mondays, Tuesdays, and Wednesdays from 7:00 a.m. to 7:30 p.m. (ALJD 4:45; Tr. 332-333; 443). The other pulmonary function technicians have also been specially trained to perform the duties that Nasir performs in the OR and can fill in for Nasir when he is not working. (Tr. 328-329).

C. Respondent Established a Mandatory On-Call Schedule for the Pulmonary Diagnostic Services Department.

Because there is often a need for emergency surgeries and procedures to be performed in the operating room around the clock, the Hospital has utilized an on-call schedule to cover the needs of the Pulmonary Diagnostic Services Department since at least 2004 or 2005 when the employees were first represented by a union. (ALJD 5:10-14; Tr. 335-337; 446-448; GCx-48). The pulmonary function technicians and OR blood gas technician were placed on the on-call schedule by Pulmonary Diagnostic Services Manager Farr in order to cover the blood gas lab's needs in the OR in the evenings and on the weekends, when the pulmonary function technicians were not regularly assigned to work. (Id). Farr would post monthly schedules two weeks in advance of the month that needed coverage and the pulmonary function technicians and OR blood gas technician would typically be assigned to be on-call one evening per week and one weekend per month. Weekend coverage was from 7 p.m. on Friday through 7 a.m. on Monday. (Id). Placement on this on-call schedule was mandatory. (ALJD 5:17-18; Tr.339).

D. Since 2004 or 2005 Pulmonary Diagnostic Services Department Employees Were Paid An Extra-Shift Bonus When They Worked Extra Shifts Pursuant to the On-Call Schedule.

Pursuant to the Agreement and past practice, the pulmonary diagnostic services employees were paid a rate of \$5.75 per hour for simply being placed on the on-call schedule, regardless of whether or not they were called into work. (ALJD 5:24-31; Tr. 446; GCx-4 pp. 56-57). When pulmonary diagnostic services employees on the on-call schedule were needed to assist with a procedure in the operating room and were called into work for an evening or weekend shift, they would be paid a rate of time-and-a-half their base hourly rate for the hours they were required to work. (ALJD 5:29-30; Tr. 340; GCx-4 pp. 56-57).

Pulmonary diagnostic services employees also received an extra shift bonus of \$125 when they worked an additional 12-hour shift on top of their regular full time hours. Any additional hours worked beyond the additional 12-hour extra shift were pro-rated at a rate of approximately \$10.42 per hour (\$125.00 divided by 12 hours). (ALJD 5:33-42; GCx-4 p. 52; Tr. 285; 334-335). Although the contract reads that employees are entitled to this extra shift bonus when they *sign up* to work an extra shift, Farr had had a long-standing past practice, since at least 2004 or 2005, of paying the extra-shift bonus to the pulmonary diagnostic services department employees when they were called into the Hospital from the mandatory on-call OR blood gas lab schedule in order to work an evening or weekend shift. (ALJD 5:44-6:9; GCx-4 p. 52; Tr. 340; 448). Pulmonary Function Technician Darren May (herein May) and OR Blood Gas Technician Nasir both testified that they were paid the extra shift bonus in this manner by Farr on a regular basis. (ALJD 9:11-14). The extra shift bonuses were coded on employees' paystubs as "Differential 2." (ALJD 5:46-48; Tr. 340-344; 448; GCx-49).

E. When Respondent Upgraded Time-Keeping System, It Discovered That Pulmonary Diagnostic Services Department Employees Were Being Paid Extra-Shift Bonuses For Working Extra Shifts Pursuant to The Mandatory On-Call Schedule.

Chief Human Resources Officer Matthew McElrath (herein McElrath) testified that Respondent's timekeeping and payroll system, called "Kronos" underwent a major upgrade in August 2010. McElrath was highly involved in the upgrade of the Kronos system. (ALJD 5:10-20; Tr. 817-818). Managers were trained on using the new Kronos system for a few weeks during approximately the fall of 2010 and the upgrade went live on or around October 1, 2010. (Tr. 819-821). After the new software was implemented Farr discovered she was having a hard time programming her old timekeeping system into the new Kronos system. This triggered an

investigation into why the program wasn't working as it should have been and eventually revealed Farr wasn't coding the extra shift bonuses correctly and the new system wouldn't allow her to pay the extra shift bonuses for call-back hours worked on the Blood Gas lab on-call schedule as she had in the past. (ALJD 6:15; Tr. 506; 509-510).

F. Respondent Unilaterally Discontinues Paying the Extra-Shift Bonus to Pulmonary Diagnostic Services Department Employees.

Upon discovering this practice, Human Resources Manager Eva Herberger (herein Herberger) notified McElrath that Farr had been improperly paying the extra-shift bonus to pulmonary diagnostic services employees for the callback hours worked on the OR blood gas lab on-call schedule. McElrath recommended to Herberger that the problem be fixed, and it was. Respondent unilaterally ceased paying the extra-shift bonus to Pulmonary Diagnostic Services Department Employees. (ALJD 6:18; Tr. 780-782).

G. Pulmonary Diagnostic Services Department Employees Discover That Their Extra-Shift Bonuses Have Been Discontinued.

On October 1, 2010, May received his paycheck for the payroll period of September 12-25, 2010, and noticed that the extra shift bonus for call-back hours worked on the blood gas lab OR on-call schedule was not indicated on this paystub. (ALJD 6:35; Tr. 344-346; GCx-50). Immediately after noticing this problem on his paycheck, May went to speak with Farr. Farr initially told May that she had probably made a mistake and that she would correct the problem. Farr followed up with May a few days later, on approximately October 5, 2010, and told him that she had been making a mistake by paying the pulmonary diagnostic services employees the extra shift bonus on the hours employees were called back into work from the mandatory blood gas lab on-call schedule. (ALJD 6:40; Tr. 346).

H. The Employees Notify the Union That Extra-Shift Bonuses Have Been Eliminated.

May told Farr that the pulmonary diagnostic services employees had always been paid the extra shift bonus in that manner and that he was going to raise the matter with the Union. (Tr. 346-347). Later that day, May faxed his paystub to and informed Union Organizer and then designated field representative Orea of the problem. Orea's conversation with May was the first notice that the Union received of the elimination of the extra shift bonus. (346-347; 479-480). In early October 2010, May informed Nasir that Farr didn't include the extra shift bonus on his paycheck. After hearing this, Nasir followed up with Farr who told him that the pulmonary diagnostic services employees wouldn't be receiving the extra shift bonus as they had in the past because there had been a mistake and she had coded it wrong. (ALJD 6:42; Tr. 449-451).

I. The Union Demands Bargaining and That Respondent Resume Payment of Extra-Shift Bonuses.

On October 12, 2010, Orea sent a letter to Human Resources Manager Herberger regarding elimination of the extra-shift bonus for call-back hours worked and other issues. This letter read in relevant part:

It has come to my attention that [the Hospital] has implemented the following changes without notifying the Union... You are now refusing to pay the extra shift bonus to the PFT Department which has been paid for many years... all the above changes are unilateral changes. The Union was never notified about these changes. *The Union demands that you cease and desist from implementing these changes immediately until the Union has had a chance to meet with you to negotiate over these changes* [emphasis added]. Please call me to set up at time to meet. We are prepared to meet on any day and time that works for you. (ALJD 648-50; Tr. 479-480; GCx-54).

Orea testified that on October 22, 2010, he met with Respondent's Counsel, Linda Deacon, (herein Deacon) to discuss elimination of the extra-shift bonus and other issues. During this meeting Orea raised the issue of the elimination of the extra-shift bonus as an example of the

things that Respondent was doing that were creating turmoil and as an example of one of the unilateral changes implemented by Respondent. Deacon told Orea that the way the extra shift bonus had been paid for call back hours worked on the OR blood gas lab on call schedule was a mistake. Orea told Deacon that the parties needed to come together and find a resolution of this matter. Deacon said she would look into the matter further. Orea did not agree to the elimination of the extra shift bonus during this meeting nor was this matter resolved in any way. (ALJD 6:6-13; Tr. 489-490).⁶

J. The Union Files A Grievance.

Shortly after Union Organizer Mendoza took over for Orea as field representative in early November 2010, she learned about the change to the payment of the extra-shift bonus during a conference call with employees in the Pulmonary Diagnostic Services Department. Prior to this conference call, Respondent never notified her of this change. (Tr. 285). On November 11, 2010, the Union filed a grievance over the elimination of the extra-shift bonus. (ALJD 6:15-16; Tr. 286; 451; GCx-28).

A grievance meeting was held on December 9, 2010. In attendance at this meeting were: Mendoza; Nasir; Pulmonary Function Technician Lisa Rogers; and Human Resources Manager Herberger. The Union and the employees conveyed to Herberger that the way that the extra-shift bonus had been paid was a past practice and that the Union had not been notified prior to Respondent's unilateral elimination of the bonus. The Union and the employees then proposed that in order for the pulmonary diagnostic services employees to qualify for the extra-shift bonus, the OR blood gas lab on-call schedule of the pulmonary diagnostic services employees should be made voluntary instead of mandatory, giving the pulmonary diagnostic services employees the

⁶ Deacon did not testify to refute any of the statements made during this meeting.

first right to sign up for open slots, and if all slots weren't filled by the pulmonary diagnostic services department employees, then the respiratory department would be allowed to fill the open slots. Herberger was receptive to the Union and the employees' proposal analogizing it to the way priority was given to certain employees in other departments of the Hospital. Herberger stated that she would discuss the proposal with Sarkissian and Farr and get back to the Union. (ALJD 10:4-14; Tr. 454-455; 288-289). The Union did not agree to the elimination of the pulmonary diagnostic services on-call schedule during this meeting but simply suggested a manner in which to resolve the issue of the extra-shift bonus. (ALJD 10:9-12; Tr. 289).

K. Respondent Eliminates The Mandatory On-Call Schedule for the Pulmonary Diagnostic Services Department.

At the beginning of January 2011, Herberger called Mendoza and stated that Respondent was agreeing to the Union's proposal to eliminate to the pulmonary diagnostic services blood gas lab on-call schedule in the OR. Mendoza clarified to Herberger that that had not been the Union's proposal, but stated she had to get off the phone as she was about to walk into another meeting. (ALJD 10:14-19; Tr. 288-289). Mendoza saw Herberger during a bargaining session a couple of days later, on approximately January 4, 2011, and reiterated that the elimination of the blood gas lab on-call schedule had not been the Union's proposal. Mendoza asked if she and the other pulmonary diagnostic services department employees could meet with Herberger to discuss their proposal. They scheduled to meet on approximately January 5, 2011. (Tr. 290).

On approximately January 5, 2011, Mendoza, Pulmonary Function Technician May and OR Blood Gas Technician Nasir met with Pulmonary Diagnostic Services Manager Farr and Herberger. Mendoza and the employees reiterated that they had originally proposed that if management was going to refuse to pay the extra shift bonuses to employees for hours worked

from the on-call schedule, then the Union and the employees wanted Respondent to make the on-call schedule voluntary instead of mandatory, allowing the pulmonary employees the first right to voluntarily sign up on the on-call list, then employees would still get the extra-shift bonus if they signed up for a shift and their hours qualified them for the bonus. (ALJD10:20-32; Tr. 290; 347-349; 456). Herberger replied that Respondent did not agree to their proposal and that what they were going to do instead was eliminate the OR on-call schedule for pulmonary. Mendoza responded that the elimination of the OR on-call schedule was yet another unilateral change and the Union wanted to negotiate over it. Herberger told Mendoza and the employees that the lead respiratory therapists and the clinical coordinators in the respiratory department would be taking over the work in the OR Blood Gas Lab. (ALJD 10:30; Tr. 290-292; 347-349).

On January 12, 2011, Herberger sent a letter to Mendoza denying the Union's grievance over the elimination of the extra-shift bonus. (Tr. 292; GCx-31). On January 24, 2011, Mendoza sent a letter to Herberger, summarizing in great detail the proposal that the Union and the employees set forth above during the December 9, 2010 meeting and clearly explaining that Respondent had disregarded the Union's original proposal and instead only "picked and chose" those aspects of the proposal that it wanted. In this letter, Mendoza also demanded that Respondent cease and desist from the implementation of the change to the OR on-call schedule. (Tr. 294; GCx-32).

As of the beginning of February 2011, despite the Union's efforts to resolve this matter with Respondent, the OR on-call schedule was completely eliminated and Respondent began assigning employees in the Respiratory Department to handle the OR Blood Gas Lab work previously handled by the staff of the Pulmonary Diagnostic Services Department via the on-call schedule. (ALJD 10:38-42; Tr. 351; 456). On February 7, 2011, the Union filed a grievance

over the elimination of the on-call schedule. (Tr. 292; 458; GCx-30). On February 16, 2011, Herberger sent a letter to Mendoza denying the Union's grievance over the elimination of the on-call schedule. (Tr. 295; GC-x 33).

L. Pulmonary Diagnostic Services Department Employees Wages Are Reduced As a Result of the Changes.

May testified that he has lost approximately between \$1,000 to \$2,000 per month as a result of the elimination of the on-call schedule (including the \$5.75 hourly rate he was paid for simply being paid to be placed on the on-call list, in addition to the hours he was paid when he was called back and paid at a rate of time-and-a-half his regular salary). Because the mandatory OR on-call schedule has been eliminated, he also no longer has the opportunity to work evening and weekend shifts. (Tr.351-352). May testified that he has also suffered financially as a result of the elimination of the extra-shift bonus. He used to pick up between 2-4 extra shifts per month, thereby earning up to about \$500 per month. (Tr. 353). Nasir estimated that he has lost approximately \$1000 per month as a result of the elimination of both the on-call schedule and the extra-shift bonus. (Tr. 459).⁷

In approximately January 2011, Respondent began posting voluntary extra shifts for the pulmonary function lab. However these extra shifts only covered day shifts from Monday through Friday and didn't give employees in the pulmonary diagnostic services department the same amount of opportunities to earn extra money as they did via the evening and weekend shifts included in the OR on-call schedule. (Tr. 363; 467-468). Also although there are also extra shift opportunities in the Respiratory Department, the pulmonary diagnostic services department employees do not have the opportunity to sign up for these shifts as there are only between 10

⁷ Respondent's own Custodian of the Records was unable to clearly explain the payroll records entered into the record as exhibits Rx 38-42 and was unable to reconcile the differences between the employees' paystubs and their own payroll records. (Tr. 808-816).

shifts available for the nearly 100 respiratory department and pulmonary diagnostic services department employees. The pulmonary diagnostic services department employees have to compete for the extra shifts with the dozens of respiratory therapists and will be bumped by any who have more seniority than they do. (Tr. 468-470).

May also testified that the OR Blood Gas Lab has suffered since the elimination of the on-call schedule. The equipment in the lab no longer gets the proper maintenance and the quality control of the lab is no longer in place as it was when the specially trained Pulmonary Diagnostic Services Department employees were solely responsible for the lab. (Tr. 351-352). The respiratory therapists now have to balance the OR Blood Gas Lab among their other regular duties and, thus, don't have the same time, attention or training to spend on the OR Blood Gas Lab as did the pulmonary diagnostic services staff. (Tr. 352; 364).

IV. ARGUMENT

A. Respondent Violated Section 8(a)(1) and (5) of the Act by Unilaterally Eliminating the Extra-Shift Bonus.⁸

An employer violates Section 8(a)(5) and (1) of the Act if it makes a unilateral change in wages, hours, or other terms and conditions of employment without first giving the union notice and an opportunity to bargain. (ALJD 10:52-11:9). See *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

An employer's unilateral change certainly constitutes an 8(a)(5) violation when numerous

⁸ At the hearing, Respondent attempted to show that the General Counsel had not properly worded the complaint with respect to the payment of the extra-shift bonus for call-back hours worked on the blood gas lab on-call schedule. (Tr. 354-358). General Counsel maintains that the terms on-call and call-back can be used interchangeably. Moreover, Respondent was not prejudiced by General Counsel's wording of the complaint, as the record evidence makes clear that Respondent was well aware of the factual issues that it needed to defend against. Moreover in order to clarify matters, the General Counsel did make a motion to conform the pleadings to the proof in the case and later made a motion to amend the complaint. Both of these motions were rejected. (ALJD 4:21-31; Tr. 495-496; 918-922).

bargaining unit employees are affected, and can even constitute an 8(a)(5) violation when only one employee is affected by the change. *See, e.g., Carpenters, Local 1301*, 321 NLRB 30, 32 (1996); *Kentucky Fried Chicken*, 341 NLRB 69, 83 (2004).⁹

It is well-settled that wages are a mandatory subject of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 348 (1958). Even though the unilateral action may have been initiated through a mistake, an employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if these practices are not required by a collective-bargaining agreement. *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). As the ALJ noted, these past practices cannot be changed without offering the unit employees' collective bargaining representative notice and an opportunity to bargain. (ALJD 9:43-10:3). *See also Granite City Steele Co.*, 167 NLRB 310, 315 (1967); *Queen Mary Rest. Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *B & D Plastics*, 302 NLRB 245 fn. 2 (1991); *DMI Distrib. of Delaware*, 334 NLRB 409, 411 (2001). Even when such a unilateral change is purported to be the correction of a short-term payroll or other error, the employer has a duty to bargain with the union about such changes. *See, e.g., Mid-Wilshire Health Care Center*; 337 NLRB 72 (2001).

In its exceptions Respondent argues that the cases cited by the ALJ and the General Counsel do not support a finding of a violation because they do not involve situations in which the past practice was established as a result of a mistake. Contrary to Respondent's claim, some of the cases do involve practices established by an employer's mistake. For example, *Mid-Wilshire Health Care Center*, *supra*, *JPH Mgmt., Inc.*, 337 NLRB 72 (2001), and *Prime Healthcare Servs.-Garden Grove LLC*, 357 NLRB No. 63 (2011) involve practices established

⁹ In *Kentucky Fried Chicken*, the Board affirmed an ALJ's finding that the employer had committed a unilateral change under Section 8(a)(5) of the Act by changing the job duties of one single employee.

by errors or mistakes. While some of the cases cited admittedly do not involve practices created by mistakes, they all involve practices that are not described in the collective-bargaining agreements that ostensibly govern all of the employees' terms and conditions of employment.

In *Prime Healthcare Servs.-Garden Grove LLC*, supra, the employer, due to clerical errors, allowed certain reserve sick leave benefits to accrue for employees for approximately 9 months, despite the fact that the employer had intended to cancel such benefits. The employer then realized the mistake and issued a memorandum notifying its employees of the mistake and the fact that the reserve sick leave benefits would no longer accrue. The employer did not, however, inform the Union of this change either before or after the memorandum was issued. Instead, like the Union in this case, the Union learned of the change from the employees. The Board found that under these circumstances, the employer had failed to notify the union and allow an opportunity to bargain and had acted unilaterally in violation of Section 8(a)(1) and (5) of the Act. *Id.*, slip op. at 3.

Similarly, in *JPH Mgmt., Inc.*, supra, the employer, during collective-bargaining negotiations with the bargaining representative of its employees, mistakenly gave its employees a wage increase for five weeks and subsequently informed its employees that the wage increases were being rescinded. Thereafter, and without notifying or bargaining with the union, the employer rescinded the wage increase. The Board in *JPH Mgmt., Inc.* found that, despite its alleged mistake, the employer's unilateral rescission of the wage increase warranted a cease and desist order because wages are always considered mandatory subjects of bargaining and that during contract negotiations, an employer may not make changes to represented employees' terms and conditions of employment without bargaining to impasse. *Id.* at 73, citing to *NLRB v.*

Katz, supra; Taft Broadcasting Co., 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

B. Respondent Had a Past Practice of Paying the Extra-Shift Bonus.

The Board has generally held that employer practices which occur over a long period of time supply the longevity needed to establish a past practice. In *Granite City Steel Co.*, 167 NLRB at 315, the Board found a past practice when the employer allowed six succeeding union business representatives access to the blast furnace plant for 15 years for the purpose of resolving grievances. In *Sunoco, Inc.*, the Board found a past practice when for 3 years the employer offered unit employees at certain facilities the chance to deliver jet fuel. *Sunoco, Inc.*, 349 NLRB at 244. As long as the past practice occurs with sufficient regularity and frequency that employees could reasonably expect the “practice to continue or reoccur on a regular and consistent basis,” it can not be discontinued without first affording the union representing the affected employees notice and an opportunity to bargain. *Id.* The key factor is whether the employees reasonably expected that the practice would continue.

Here, the Respondent’s alleged “mistake” of paying the pulmonary diagnostic services department employees the extra-shift bonus for call-back hours worked on the OR blood gas lab on-call schedule occurred long enough for them to have a reasonable expectation that it would continue on a regular basis. The record contains testimonial and documentary evidence that this practice had occurred since the employees were initially represented by a union, in approximately 2004 or 2005, and continued for years after Respondent purchased the Hospital on April 1, 2009. The bonus was given to an entire department of employees, albeit a small

department.¹⁰ Even though the bonus applied to only a small number of employees in the unit, it was given to a discrete section of the unit for a significant period of time. While it would not have been reasonable for the other pulmonary function therapists, for example, to expect to receive extra-shift bonuses when assigned to be on-call and called back to work who had not received the bonus before on a regular basis, it was reasonable for the five employees in the Pulmonary Diagnostic Services Department to expect that they would receive the bonus when they were called back to work an extra shift. Respondent, therefore, was not privileged to eliminate their extra-shift bonus without first notifying and bargaining with the Union.

Respondent argues that the record does not contain evidence of a practice that was “regular, consistent and not random.”¹¹ While Respondent correctly notes that the ALJ was confused by certain testimony and documentary evidence, Respondent ignores the ALJ’s principal finding—that the employees testified that they regularly received the extra-shift bonus since 2004 or 2005.¹² Respondent, who had control of all the resources to refute the employees’ testimony, failed to introduce either testimony or clear records to contradict this evidence. Susan Farr, the supervisor who gave the bonuses, did not testify, and the ALJ correctly drew an adverse inference from her failure to testify. (ALJD 9:31-41).

Respondent asserts that the Pulmonary Diagnostic Services Department employees did not regularly receive the extra-shift bonus. Although Respondent could have produced clear records, and someone capable of explaining them, to show that when employees worked an extra shift while on call, they did not regularly receive the extra shift bonus, Respondent did not produce such evidence. Because all of the evidence is in Respondent’s control, the ALJ

¹⁰ As discussed at detail above, the pulmonary diagnostic services department is its own department as the employees work separate hours, perform separate functions and are supervised by separate management than the Respiratory Department.

¹¹ Brief in support of Exceptions by USC University Hospital at 15.

¹² ALJD 9:11-14.

correctly refused to reject the employees' testimony that they regularly received extra-shift bonuses.

C. Respondent Did Not Bargain With The Union Before Eliminating the Extra-Shift Bonus.

No record evidence was presented by Respondent that the Union was ever notified or given an opportunity to bargain prior to Respondent's elimination of the extra-shift bonus for call-back hours worked on the OR blood-gas lab on call schedule. Instead, the record evidence reveals that the Kronos upgrade implemented in approximately August or September 2010 revealed an error in the way that Farr¹³ was paying the extra shift bonus, and adjusted that error. On October 1, 2010, pulmonary function technician Darren May noticed that the extra shift bonus was missing from his paycheck and immediately informed Farr. A few days later Farr began informing employees in her department of the error and the fact that she would no longer be paying the extra shift bonus for call-back hours worked on the blood gas lab on-call schedule.

The employees then notified their Union representative, Orea, of the unilateral change, *after* the change had been implemented. This was the first that Orea had heard of the change and he immediately thereafter sent a cease and desist letter to Respondent and demanded that Respondent bargain over the change. Although Orea met with Respondent's counsel on October 22, 2010, the ALJ correctly noted that Respondent failed to present evidence that the matter of the extra shift bonus was bargained over or resolved during that meeting.¹⁴ Even assuming *arguendo* that Respondent had properly notified the Union of its intention to eliminate the extra

¹³ The ALJ correctly drew an adverse inference from Respondent's failure to produce Farr as a witness to testify about these allegations. *International Automated Machines*, 285 NLRB 1122, 1123 (1987)(failure to call witness reasonably assumed to be favorably disposed to party, warrants adverse inference on factual questions of which the witness would have knowledge).

¹⁴ ALJD 11:10-20. Moreover, an adverse inference should also be drawn from Respondent's failure to produce Deacon as a witness to testify about this meeting. *International Automated Machines*, *supra* at 1123.

shift bonus for call back hours worked, the ALJ correctly concluded that the notification would have been a *fait accompli*. As demonstrated by Respondent's record evidence at the hearing, the Hospital had already changed the way it paid the extra shift bonus and it was not possible to continue paying the bonus as it had in the past. *S&I Transportation*, 311 NLRB1388, 1388 at n.19 (1993) (finding *fait accompli* where employer's testimony at hearing revealed employer's fixed position to implement changes).

D. Respondent Violated Section 8(a)(1) and (5) of the Act By Unilaterally Eliminating the Mandatory Blood Gas Lab On-Call Schedule.¹⁵

As for the elimination of the blood gas lab on-call schedule, this change came as a result of the Union's proposal in effort to resolve the issue of the extra shift bonus, during the meeting in December 2010. The Union proposed that the blood gas lab on-call schedule be switched from mandatory to voluntary, but with the pulmonary diagnostic services employees having the first opportunity to sign up for the on-call schedule.¹⁶ The Hospital seized on that proposal and took only the portions it wanted, namely eliminating completely the mandatory blood gas lab on-call schedule, and not allowing the pulmonary diagnostic services employees in question the first right to sign up.

¹⁵ At the hearing, Respondent attempted to show that the General Counsel had not properly worded the complaint with respect to the payment of the extra shift bonus for call back hours worked on the blood gas lab on-call schedule. (Tr. 354-358). General Counsel maintains that the terms on-call and call-back can be used interchangeably. Moreover, Respondent was not prejudiced by General Counsel's wording of the complaint, as the record evidence makes clear that Respondent was well aware of the factual issues that it needed to defend against. Moreover in order to clarify matters, the General Counsel did make a motion to conform the pleadings to the proof in the case and later made a motion to amend the complaint. Both of these motions were rejected. (ALJD 4:21-31; Tr. 495-496; 918-922).

¹⁶ Although Herberger's account of the proposal offered during the December meeting differs from that of Mendoza, May and Nasir, Mendoza, May and Nasir's testimony should be credited over that of Herberger as their testimony was clear, consistent and they corroborated one another. Moreover Mendoza's lengthy letter to Herberger detailing the Union's proposal corroborates the account of Mendoza, May and Nasir.

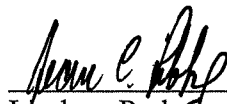
Because this change in the on call schedule came as part of a proposed settlement on the initial unilateral change (the extra shift bonus pay), and the parties never agreed on this resolution, the ALJ correctly concluded that the elimination of the blood gas lab on-call schedule was yet another unilateral change committed by Respondent. (ALJD 11:10-20). Although Respondent and the Union met in January 2011 to discuss the elimination of the OR blood gas lab on-call schedule, before the voluntary on-call schedule was actually implemented, the ALJ correctly concluded that Respondent simply announced the elimination of the on-call schedule as a *fait accompli* and allowed no room to bargain over that issue. *S&I Transportation*, *supra*. Afterward, and before the on-call schedule was eliminated, Mendoza sent a detailed letter to Herberger re-explaining the Union's proposal with respect to the extra-shift bonus and demanding that Respondent cease and desist from making any changes to the OR blood gas lab on-call schedule.

As discussed above, the elimination of both the extra shift bonus and the on-call schedule has greatly affected the wages of the employees in the pulmonary diagnostic services department. Both Nasir and May testified that they have lost out on between one to two thousand dollars of monthly income as a result of this change. Accordingly because Respondent failed to provide the Union with notice and an opportunity to bargain over these changes, and because these changes materially affect the terms and conditions of employees in the pulmonary diagnostic services employees, namely their wages, the ALJ correctly concluded that these changes violate Section 8(a)(1) and (5) of the Act.

V. CONCLUSION

Based on the above, the record evidence and applicable Board law establish that the ALJ correctly concluded that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally eliminating the extra-shift bonus and on-call schedule for pulmonary diagnostic services department employees.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lindsay Parker", is written over a horizontal line.

Lindsay Parker

Jean C. Libby

Counsel for the Acting General Counsel
National Labor Relations Board

Dated at Los Angeles, California, this 6th day of June, 2012.

VI. REMEDY

Based on the violations in this case, Counsel for the Acting General Counsel submits that the appropriate remedy is the following:

A. USC University Hospital, and its officers, agents, successors, and assigns be ordered to:

1. Cease and desist from:

(a) unilaterally changing the terms and conditions of our employees in the following bargaining unit represented by the **National Union of Healthcare Workers (the Union)**, by: changing the way we pay the extra-shift bonuses for the pulmonary diagnostic services department employees; eliminating the blood gas on-call schedule; changing the schedule of the echo tech employees from a 3-day-a-week, 12-hour-a day schedule to a 5-day-a-week, 8-hour-a-day schedule; without giving prior notice to the Union and affording the Union an opportunity to bargain about these changes.

Included: All full-time, regular part-time and per diem service, maintenance, technical and skilled maintenance employees employed by the Employer at its facility located at 1500 San Pablo Street, Los Angeles, California;

Excluded: All other employees, managers, supervisors, confidential employees, guards, physicians, residents, central business office employees (whether facility-based or not) who are solely engaged in qualifying or collection activities, employees of outside registries and other agencies supplying labor to the Employer and already-represented employees.

(b) in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of employees in the above unit concerning terms and conditions of employment, and if an understanding is reached, embody it in a signed agreement.

(b) before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the above units.

(c) immediately restore payment of the extra-shift bonuses to the pulmonary diagnostic services department employees as it existed on September 1, 2010, when call-back hours were included and make whole the affected pulmonary diagnostic services department employees for any extra shift bonus money lost as a result of our unilateral elimination of this benefit, plus interest.¹⁷

(d) immediately restore the mandatory Blood Gas Lab On-Call Schedule as it existed on January 1, 2011, and pay employees for the on-call schedule hours and any extra shift bonuses they would have earned, plus interest. reinstate tuition reimbursement for continuing education as a result of our unilateral elimination of this schedule, plus interest.

(e) immediately reinstate the 3-day-a-week, 12-hour-a-day schedule of the echo techs as it existed on November 1, 2010.

¹⁷ Interest for this, and the other make-whole remedies involved in this case, should be ordered consistent with the Board's recent decision in *Jackson Hospital Corp.*, 356 NLRB No. 8 (2010).

(f) post, consistent with the Board's recent decision in *J&R Flooring, Inc.*, 356 NLRB No. 9 (2010), the appropriate Notice.¹⁸

(g) notify the Regional Director for Region 21, in writing, within 20 days from the date of the Administrative Law Judge's Order, what steps have been taken to comply with that Order.

¹⁸ A proposed Notice is attached.

Attachment (Proposed Notice to Employees)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT

do anything to prevent you from exercising the above rights.

WE WILL NOT

unilaterally change the terms and conditions of employment of our employees in the following bargaining unit represented by the **National Union of Healthcare Workers (the Union)**, without giving prior notice to the Union and affording the Union an opportunity to bargain about these changes, by: changing the way we pay the extra shift bonuses for the pulmonary function technicians; eliminating the blood gas on-call schedule; changing the schedule of the echo tech employees from a 3-day-a-week, 12-hour-a-day schedule to a 5-day-a-week, 8-hour-a-day schedule; without giving prior notice to the Union and affording the Union an opportunity to bargain about these changes.

Included: All full-time, regular part-time and per diem service, maintenance, technical and skilled maintenance employees employed by the Employer at its facility located at 1500 San Pablo Street, Los Angeles, California;

Excluded: All other employees, managers, supervisors, confidential employees, guards, physicians, residents, central business office employees (whether facility-based or not) who are solely engaged in qualifying or collection activities, employees of outside registries and other agencies supplying labor to the Employer and already-represented employees.

WE WILL NOT

in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL

bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of employees in the above unit concerning terms and conditions of employment, and if an understanding is reached, embody it in a signed agreement.

WE WILL

before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the above unit.

WE WILL

restore our pay of the extra shift bonuses to the pulmonary function technicians as it existed on September 1, 2010, when call-back hours were included and make whole the affected pulmonary function technicians for any extra shift bonus money lost as a result of our unilateral elimination of this benefit, plus interest.

WE WILL

restore the mandatory Blood Gas Lab On-Call Schedule as it existed on January 1, 2011, and pay employees for the on-call schedule hours and any extra shift bonuses they would have earned, plus interest.

WE WILL

reinstate the 3-day-a-week, 12-hour-a-day schedule of the echo techs as it existed on November 1, 2010.

USC UNIVERSITY HOSPITAL

(Employer)

Dated: _____

By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

Telephone:

Hours of Operation:

STATEMENT OF SERVICE

I hereby certify that a copy of **Answering Brief of Counsel for the Acting General Counsel to Respondent's Exceptions Cases 21-CA-39656 et. al.**, was submitted for E-filing to the National Labor Relations Board on June 6, 2012.


The following parties were served with a copy of said document by electronic mail on June 6, 2012.

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Respectfully submitted,



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Jean C. Libby
Counsel for the Acting General Counsel
National Labor Relations Board

Dated at Los Angeles, California, this 6th day of June, 2012.